7701 (10) (13)

Nos. 06-340 and 06-549

In The Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPENING BRIEF OF PETITIONERS NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*

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QUESTIONS PRESENTED

1. Whether a court can append additional criteria to Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b), by requiring State NPDES programs to include protections for endangered species.

2. Whether Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), overrides statutory mandates or constraints imposed on an agency's discretion by other Acts of Congress.

3. Whether Section 7(a)(2) of the Endangered Species Act constitutes an independent source of authority, requiring federal agencies to take affirmative action to benefit endangered species even when an agency's enabling statutes preclude such action.

4. Whether the court of appeals incorrectly applied the holding of *Department of Transp. v. Public Citizen*, 541 U.S. 752 (2004), in concluding that EPA's approval of Arizona's NPDES program was the legally relevant cause of impacts to endangered species resulting from future private land use activities.

5. Whether the court of appeals correctly held that EPA's decision to transfer permitting authority to Arizona under Section 402(b) of the Clean Water Act was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act; and, if so, whether the court of appeals should have remanded to EPA for further proceedings without ruling on the interpretation of Section 7(a)(2).

PARTIES TO THE PROCEEDING

Petitioners are National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce and American Forest & Paper Association ("Home Builders"), and the U.S. Environmental Protection Agency.

Respondents are Defenders of Wildlife, Center for Biological Diversity and Craig Miller.

Other parties before the court of appeals were the U.S. Fish and Wildlife Service and the State of Arizona.

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The opinion of the court of appeals and the dissent (Pet. App. 1-68) are reported at 420 F.3d 946. The order denying the petitions for panel rehearing and rehearing *en banc*, the dissents from the denial of rehearing, and the concurrence (Pet. App. 134-58) are reported at 450 F.3d 394.

JURISDICTION

The court of appeals entered judgment on August 22, 2005, and denied rehearing and *en banc* rehearing on June 8, 2006. Home Builders timely filed their petition for a writ of certiorari on September 6, 2006. The U.S. Environmental Protection Agency (EPA) was granted extensions of the filing deadline, and timely filed its petition for a writ of certiorari on October 23, 2006. The Court granted and consolidated the petitions on January 5, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Clean Water Act, 33 U.S.C. §§ 1251-1387, the Endangered Species Act, 16 U.S.C. §§ 1531-1544, and those statutes' implementing regulations are set out in an appendix to this brief.

STATEMENT

This case concerns the relationship between two major environmental laws, the Clean Water Act (CWA) and the Endangered Species Act (ESA), and the authority of the agencies that administer those laws, EPA and the U.S. Fish and Wildlife Service (FWS). On December 5, 2002,

EPA approved the State of Arizona's application to administer the National Pollutant Discharge Elimination System (NPDES) program under Section 402(b) of the CWA, 33 U.S.C. § 1342(b). Section 402(b) states that EPA "shall approve each submitted [State] program" unless it "determines that adequate authority does not exist" for the State to administer the program in compliance with nine specified criteria. There was and is no dispute that Arizona's program satisfied those criteria and EPA's implementing regulations.

Respondents (Defenders) instead contended that EPA violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), because EPA did not sufficiently analyze the effects of the loss of, nor require a sufficient substitute for, consultation with FWS when discharge permits are issued. Section 7(a)(2) requires each Federal agency to "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat" designated for such species. See, *e.g.*, *Bennett v. Spear*, 520 U.S. 154, 158 (1997) (describing the consultation process).

A majority of the court of appeals' panel agreed with Defenders and vacated EPA's approval of Arizona's program. The court acknowledged that EPA lacked authority under the CWA to act for the benefit of listed species in approving State NPDES program submissions. Pet. App. 53. The court instead redefined and expanded the obligations of Federal agencies under the ESA, holding: (1) Section 7(a)(2) grants independent authority to Federal agencies to act for the benefit of listed species; (2) such authority overrides any conflicting mandates imposed by Congress in other statutes; and (3) any "authorizing action" by Federal agencies creates an

obligation to exercise this new-found authority. *Id.* at 30-44. Circuit Judge Kozinski, who dissented with five other judges from the denial of rehearing, explained: "the majority treats the ESA as superior to all other laws, thereby nullifying a crucial ESA regulation and forcing agencies to violate their governing statutes." *Id.* at 137.

1. The Clean Water Act and the NPDES Program

Congress enacted the CWA to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress also stated:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources. . . . *It is the policy of Congress that States . . . implement the permit programs under sections 402 and 404 of this Act.*

33 U.S.C. § 1251(b) (emphasis supplied); see also *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (*SWANCC*) (the extension of jurisdiction under the CWA to isolated, intrastate waters "would result in a significant impingement of the States' traditional and primary power over land and water use").

Section 301 of the CWA provides that "the discharge of any pollutant by any person shall be unlawful" except as authorized by one of several regulatory programs established by the Act. 33 U.S.C. § 1311(a).[1] One of the

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[1] A "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A); see also *id.* at § 1362(16). The term "pollutant" is broadly defined to include, *inter alia*, solid waste; industrial, municipal and

(Continued on following page)

primary regulatory programs established by the CWA is the NPDES program, under which either EPA or an authorized State issues permits authorizing "the discharge of any pollutant, or combination of pollutants" from point sources. *Id.* at § 1342(a)(1). "Generally speaking, the NPDES [program] requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (summarizing the NPDES program); see also *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-08 (1976) (describing the Federal Water Pollution Control Act Amendments of 1972 and the requirements imposed under the NPDES program); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 109-11 (D.C. Cir. 1987) (*NRDC I*) (describing CWA water quality standards). Regardless of whether the issuing authority is EPA or a State, an NPDES permit must contain the same terms, conditions and requirements. 33 U.S.C. § 1342(a)(3).

The NPDES program allows individual permits issued on a site-specific basis to permit discharges from sources such as industrial plants and wastewater treatment facilities. In cases in which a large number of point source discharges are expected to be similar in nature, EPA may authorize such discharges under general permits, which cover an entire category or group of discharges and are developed by EPA through notice-and-comment proceedings similar to rulemaking. See 40 C.F.R. § 122.28. General permits are used extensively in permitting storm water discharges produced by various municipal and

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agricultural waste; sewage sludge; biological and radioactive materials; and sand and cellar dirt. *Id.* at § 1362(6). A "point source" is "any discernible, confined and discrete conveyance." *Id.* at § 1362(14). Finally, the CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* at § 1362(7).

industrial activities, including construction projects larger than one acre. 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26; see also *Texas Indep. Prod. and Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 967-68 (7th Cir. 2005) (describing EPA's general permit system for storm water discharges). Facilities seeking coverage under a general permit must submit a notice of intent describing the nature of the facility, where it is located, and why the facility qualifies for coverage under the general permit, and must comply with the terms and conditions of the permit. 40 C.F.R. § 122.28(b)(2); see also *Texas Indep. Prod.*, 410 F.3d at 968-69 (discussing EPA's current general permit for discharges from construction sites).[2]

2. The States' Authority to Administer the NPDES Program

Under the CWA, each State has the right to administer the NPDES program if the State's program satisfies the criteria in Section 402(b). Section 402(b) of the CWA provides:

> [T]he governor of each State desiring to administer its own permit program for discharges into the navigable waters within its jurisdiction may submit to the Administrator [of EPA] a full and complete description of the program it proposes to establish and administer under State law .... *The Administrator* ***shall approve*** *each such submitted program* ***unless*** *he determines that adequate authority does not exist*

[2] A large portion of the permits issued in Arizona relate to storm water discharges from construction sites. Pet. App. 49 n.22. The "pollutant" is typically loose soil washed from an unstabilized construction site during a period of heavy rain, and the "navigable water" is a desert wash.

> [to administer the program in compliance with nine specific criteria].

33 U.S.C. § 1342(b) (emphasis supplied); see also 40 C.F.R. §§ 123.1(c), 123.61(b); *EPA v. California,* 426 U.S. at 208. Indeed, Congress' policy statement in 33 U.S.C. § 1251(b) specifically provides that the States are to implement the NPDES program.[3]

The nine criteria in Section 402(b) relate specifically to administering the NPDES program. For example, the State's program must contain adequate authority for the State to issue permits that meet minimum regulatory requirements under the CWA; ensure that the public, affected States and EPA receive notice of permit applications; provide an opportunity for public comment and a hearing on permit decisions; and provide adequate enforcement authority, including authority to impose fines and penalties for violations. 33 U.S.C. § 1342(b)(1)-(9); see also 40 C.F.R. §§ 123.21-123.30 (describing the required elements of a State's program submission). In addition, the State program must meet guidelines adopted by EPA under Section 304(i), 33 U.S.C. § 1314(i), which "establish[] the minimum procedural and other elements of any State program" under Section 402, including monitoring, reporting, enforcement, funding and manpower requirements.[4]

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[3] The States have additional authorities and responsibilities under the CWA, such as the development of water quality standards and certifying that discharges resulting from federal licenses and permits will not violate water quality standards. 33 U.S.C. §§ 1313(c), 1341; see also *S.D. Warren Co. v. Bd. of Envtl. Prot.*, ___ U.S. ___, 126 S.Ct. 1843, 1846-47 (2006); *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, 511 U.S. 700, 704-08 (1994).

[4] EPA has promulgated regulations containing these guidelines (as well as implementing Section 402(b)), which are codified at 40 C.F.R. pt. 123.

Under CWA Section 402(c), EPA must act on a State's application within 90 days of submission and suspend the issuance of Federal permits unless EPA determines that the State permit program does not meet the requirements of Section 402(b) or does not conform to the Section 304(i) guidelines. 33 U.S.C. § 1342(c)(1). EPA's regulation governing the approval process similarly provides that within 90 days of receiving a complete program submission, EPA must approve or disapprove the State's program. 40 C.F.R. § 123.61(b).

As the foregoing discussion suggests, EPA does not actually "transfer" or "delegate" authority to the States. Instead, the States administer their own NPDES programs, established under each State's laws, subject to EPA's oversight authority. Following approval, the State must comply with Section 402(b) and EPA's Section 304(i) guidelines. 33 U.S.C. § 1342(b). If a State fails to comply, EPA, after public hearing, may order the State to take corrective action or withdraw approval of its program. *Id.* at § 1342(c)(3). The State also must transmit copies of each permit application to EPA and provide notice to EPA of every action taken concerning an application, including each NPDES permit the State proposes to issue. *Id.* at § 1342(d)(1); 40 C.F.R. §§ 123.43, 123.44. EPA may veto a proposed State permit "as being outside the guidelines and requirements" of the CWA by objecting in writing within 90 days of the date of permit's transmittal. 33 U.S.C. § 1342(d)(2); see also *Save the Bay, Inc. v. Admin. of EPA*, 556 F.2d 1282, 1284-87 (5th Cir. 1977) (discussing the legislative history of the Federal Water Pollution Control Act Amendments of 1972 and the respective roles of EPA and the States in administering the NPDES program).

3. The Endangered Species Act and the Section 7 Consultation Process

The ESA delegates regulatory authority to the Secretaries of Interior and Commerce. 16 U.S.C. § 1532(15). The Secretaries in turn have delegated their ESA authority so that the ESA is administered by FWS (for the Interior Department) with respect to terrestrial and some aquatic species, and by the National Marine Fisheries Service (NMFS) (for the Commerce Department) with respect to marine and certain anadromous species. See 50 C.F.R. §§ 17.2(b), 402.01.[5]

Under the ESA, protected species of wildlife, fish and plants are classified as endangered or threatened species through a notice-and-comment rulemaking process prescribed by Section 4 of the ESA and are placed on lists published in the Code of Federal Regulations. 16 U.S.C. § 1533(a)(1) & (c); see also 16 U.S.C. § 1532(6), (16) & (20) (definitions of "endangered species," "species" and "threatened species"); 50 C.F.R. pt. 424 (regulations governing listing and critical habitat designation). A similar rulemaking process is prescribed under Section 4 for the designation of listed species' critical habitat. 16 U.S.C. § 1533(a)(3) & (c); see also 16 U.S.C. § 1532(5) (definition of "critical habitat"); 50 C.F.R. pt. 424.[6]

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[5] Home Builders will focus on FWS in the following discussion because that agency was involved in the administrative and court proceedings below. NMFS's responsibilities under the ESA and its implementing regulations are generally identical to those of FWS. In discussing both agencies, Home Builders will refer to the "Services."

[6] The species' lists are found at 50 C.F.R. §§ 17.11 (wildlife and fish) and 17.12 (plants). The statutory process is commonly called "listing," and endangered and threatened species are often called "listed species." This terminology will be used in Home Builders' brief.

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), requires each Federal agency, "in consultation with and with the assistance of the Secretary," to ensure that "any action authorized, funded or carried out" by that agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat" designated as critical. The Services' joint regulations implementing Section 7, codified at 50 C.F.R. pt. 402, provide that Section 7 applies "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Thus, discretionary Federal actions are prohibited if they would jeopardize the existence of a listed species or destroy or adversely modify designated critical habitat, unless an exemption is granted under Section 7(h), 16 U.S.C. § 1536(h).[7]

The process by which Federal agencies satisfy their obligation to avoid jeopardy is referred to as Section 7 "consultation." A Federal agency must initially determine whether its proposed action "may affect" listed species or critical habitat. See 50 C.F.R. § 402.14(a). If the action will *not affect* any listed species or critical habitat, the agency may proceed without consultation. See *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1069-70 (9th Cir. 2005) (affirming "no effect" determinations made by the Army Corps of Engineers).

If the Federal agency believes that its proposed action is *not likely to adversely affect* the listed species or designated critical habitat, the agency may request that FWS concur with its evaluation. If FWS concurs, no additional consultation is required, and no biological

[7] This prohibition applies only to species' habitat that has been formally designated as "critical" under Section 4 of the ESA. See *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1244 (9th Cir. 2001).

opinion is prepared. This is known as informal consultation. See 50 C.F.R. §§ 402.13, 402.14(b)(1). If the proposed Federal action is *likely to adversely affect* listed species or designated critical habitat, however, formal consultation is required, during which a more thorough evaluation of the proposed action is undertaken. *Id.* at §§ 402.12(k), 402.14(a).[8]

Following the completion of formal consultation, FWS provides a biological opinion to the Federal agency. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(g) & (h). A biological opinion "alters the legal regime to which the action agency is subject," and exposes the agency (as well as any permit or license applicant) to potential liability. *Bennett*, 520 U.S. at 169-70. If a "jeopardy" biological opinion is proposed, FWS will recommend reasonable and prudent alternatives to the proposed action. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). To be "reasonable and prudent," an alternative must be consistent with the intended purpose of the action, within the Federal agency's legal authority and jurisdiction, and economically and technologically feasible. 50 C.F.R. § 402.02. When a "jeopardy" biological opinion is issued, the action agency can either implement FWS's reasonable and prudent alternatives (thereby avoiding jeopardy), terminate the proposed action altogether, or seek an exemption from the Endangered Species Committee allowing the proposed action to proceed.[9]

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[8] Most consultations are concluded informally. During fiscal year 1999, for example, FWS informally consulted on about 12,000 actions, while conducting 83 formal consultations and issuing one "jeopardy" opinion. Terry Rabot, The Federal Role in Habitat Protection, *Endangered Species Bulletin* 10, 11 (Nov./Dec. 1999), available at http://www.fws.gov/endangered/esb/99/11-12/10-11.pdf (visited Feb. 7, 2007).

[9] The Endangered Species Committee is chaired by the Secretary of the Interior, and includes cabinet-level officials and a presidential appointee representing each State affected by the application. 16 U.S.C.

(Continued on following page)

4. EPA's Previous Practice in Approving State NPDES Programs

Since the ESA was enacted in 1973, EPA has rarely consulted with the Services in approving State NPDES program submissions. Prior to Arizona's NPDES program submission in 2002, EPA consulted with the Services on only six occasions, beginning with the approval of South Dakota's application in 1993. Pet. App. 7 n.3. In contrast, EPA did *not* consult in approving programs for 39 other states. *Ibid.* Moreover, a number of those States have received multiple program approvals, resulting in more than 100 opportunities to consult under Section 7(a)(2). See *Approval of Application by Texas to Administer the NPDES Program*, 63 Fed.Reg. 51,164, 51,200 (Sept. 24, 1998) (table listing State NPDES program status).[10]

On the occasions when it consulted with the Services, EPA did not acknowledge it was legally obligated to do so or that Section 7(a)(2) applied to State NPDES program approvals. For example, in its notice approving Oklahoma's program, EPA explained:

> While it may not be clear that the section 7 consultation is specifically required for a program authorization, ESA and its implementing regulations do not restrict any agency from

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§ 1536(e). Following a threshold investigation and a hearing, the committee may grant the exemption if it determines that there are no reasonable and prudent alternatives available; the benefits of action outweigh the benefits of alternative courses and are consistent with conserving the species or its critical habitat; and the action is in the public interest and is of regional or national importance. *Id.* at § 1536(g) & (h).

[10] As shown in the table, multiple approvals are the result of States seeking approval to administer different portions of the NPDES program at different times. See 33 U.S.C. § 1342(n). The total number of State program approvals prior to 1993 is 114.

> voluntarily consulting and conferring with [FWS] on actions it believes may affect listed species.

Approval of Application by Oklahoma to Administer the NPDES Program, 61 Fed.Reg. 65,047, 65,051 (Dec. 10, 1996). More recently, in connection with approving Texas' NPDES program, EPA explained that "even if [it] was not required by law to consult with the Services, EPA believes it was within its discretion to do so." *Approval of Application by Texas*, 63 Fed.Reg. at 51,198. As the foregoing statements suggest, EPA did not have a formal policy on the applicability of Section 7(a)(2) to State program approvals prior to acting on Arizona's NPDES program submission.

Moreover, formal consultation between EPA and the Services, resulting in a biological opinion, occurred only two times before this case.[11] In both instances, the scope of the consultation was limited to aquatic species, *i.e.*, species affected by surface water quality. In the case of Maine's NPDES program, EPA consulted on two listed species: with NMFS on the effect of salmon fish farms and hatcheries on listed, wild Atlantic salmon, and with FWS on the effect of NPDES permits for six paper mills on bald eagles. *Approval of Application by Maine to Administer the NPDES Program*, 66 Fed.Reg. 12,791, 12,793-94 (Feb. 28, 2001). In the case of Texas' NPDES program, the

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[11] The consultations on the South Dakota, Florida, Louisiana and Oklahoma NPDES programs were informal, *i.e.*, the Services concurred with EPA's "not likely to adversely affect" determination, and no biological opinions were prepared. See *Approval of Application by South Dakota to Administer the NPDES Program*, 59 Fed.Reg. 1,535, 1,543 (Jan. 11, 1994); *Approval of Application by Florida to Administer the NPDES Program*, 60 Fed.Reg. 25,718, 25,719 (May 12, 1995); *Approval of Application by Louisiana to Administer the NPDES Program*, 61 Fed.Reg. 47,932, 47,934 (Sept. 11, 1996); *Approval of Application by Oklahoma*, 61 Fed.Reg. at 65,053.

consultation also was limited to species affected by the enforcement of surface water quality standards. *Approval of Application by Texas*, 63 Fed.Reg. at 51,201. EPA explained that no "obligations, procedural or otherwise," were imposed on Texas to protect listed species: "The State's only obligation is to issue permits that comply with the procedural and substantive requirements of the CWA and the State program approved by EPA." *Id.* at 51,198.

In January 2001, the Services and EPA entered into a memorandum of agreement to improve interagency coordination under the CWA and the ESA. *Memorandum of Agreement Between EPA, FWS and NMFS Regarding Enhanced Coordination Under the CWA and ESA; Notice*, 66 Fed.Reg. 11,202 (Feb. 22, 2001) (Pet. App. 245-317) (the National MOA). The operative portion of the National MOA, however, does not address whether Section 7(a)(2) applies to State NPDES program approvals. See Pet. App. 268-317. The Federal Register preamble (not the National MOA itself) states only that EPA's current practice is to consult with the Services, that such consultations are conducted on a case-by-case basis, and that the National MOA does *not* place any conditions on approval of State NPDES programs. *Id.* at 260, 266. Instead, the National MOA emphasizes that "EPA's oversight of State/Tribal permits will continue to be governed by EPA's CWA authorities. For example, EPA may only object to a permit that is 'outside the guidelines and requirements' of the CWA . . . ." *Id.* at 265 (quoting 33 U.S.C. § 1342(d)(2)); see also *id.* at 308-12 (coordination procedures for State and Tribal permits).

5. The Administrative Proceedings Concerning Arizona's NPDES Program Submission

On December 20, 2001, the Governor of Arizona requested NPDES program approval pursuant to Section 402(b). *Id.* at 546-47; see also *id.* at 80-82 (timeline of events). EPA's regional office in San Francisco (Region 9), which is responsible for the administration of the CWA in Arizona, received the State's submission package on January 14, 2002, but determined that Arizona's submission did not meet certain requirements. J.A. 10-26; Pet. App. 547. On June 5, 2002, the Governor of Arizona requested partial program approval, and a revised program was submitted to EPA. Pet. App. 547. On July 11, 2002, EPA declared that Arizona's program submission was administratively complete. J.A. 34; Pet. App. 547. EPA was required to approve or disapprove Arizona's program by October 8, 2002. J.A. 327; see also 33 U.S.C. § 1342(c) (deadline for acting on State program submissions); 40 C.F.R. § 123.61(b) (same).

On January 23, 2002, EPA contacted FWS's Arizona field office and requested initiation of informal consultation regarding approval of Arizona's NPDES program. J.A. 7-10. EPA indicated the permitting activities that Arizona's program would cover, and requested a list of species and critical habitat that those activities would affect. *Ibid.* Informal consultation between the agencies apparently continued into June 2002. See Pet. App. 80, 597.

EPA subsequently prepared a biological evaluation of the impacts of approving Arizona's program, and concluded such action would not adversely affect any listed species or their critical habitat. *Id.* at 583-623. EPA submitted the final evaluation to FWS on June 21, 2002. *Id.* at 581. In its biological evaluation, EPA concluded that no adverse effects would occur and formal consultation was unnecessary:

> The Federal action is *an administrative shift of authority* and is not associated with any physical action that will alter habitat or affect biota. The substantive CWA protections currently afforded to Federally-listed species and critical habitat under the NPDES program will continue under the [State] permit program. USEPA oversight of the [State] program, including coordination pursuant to the National MOA, will provide added assurance of this continued protection. . . . Therefore, the USEPA concludes that its proposed approval of the [State] program is not likely to adversely affect any Federally-listed species or their designated critical habitat.

Id. at 617-18 (emphasis supplied).

A dispute immediately developed between EPA Region 9 and FWS's Arizona field office in Phoenix. FWS field office employees complained that approval of Arizona's NPDES program would allow "unchecked" real estate development to occur, reducing the conservation status of the cactus ferruginous pygmy-owl, and two plant species, the Pima pineapple cactus and Huachuca water umbel. J.A. 46. The FWS employees disagreed with EPA's determination that approval of Arizona's program was merely an administrative shift in authority, asserting instead that private construction is an "indirect effect" of NPDES permits and objecting to EPA's refusal to "federalize" State permits "where the activity causing the discharge adversely affects an upland species" or may cause "decreases in water quantity." *Id.* at 45-46.

On August 20, 2002, the acting supervisor of FWS's Arizona field office acknowledged his agency's receipt of EPA's biological evaluation and request to initiate formal consultation, but requested additional information. J.A.

55-57. He also informed EPA that the 135-day period for consulting (see 50 C.F.R. § 402.14(e)) would not begin until EPA provided this information. *Id.* at 56-57. EPA immediately responded and pointed out that the information had been provided in EPA's June 21, 2002 submission. J.A. 59-63.

On September 13, 2002, a meeting took place between representatives of EPA, FWS and the Arizona Department of Environmental Quality (ADEQ) to address the interagency dispute. See J.A. 120. FWS was uncertain whether formal consultation had been initiated. *Ibid.* FWS maintained that the consultation should cover impacts to upland (terrestrial) species caused by private land uses and impacts to water quantity resulting from groundwater pumping. EPA, in contrast, maintained that it lacked authority to regulate those activities:

> We then discussed our concerns with aquatic and aquatic-dependent species. We all agreed that the process defined in the [National] MOA would address aquatic concerns, but we [FWS] expressed concerns about issues of water *quantity* .... EPA stated that effects from pumping groundwater to provide water to housing developments is out of their jurisdiction and they have no discretion to modify or condition permits for this type of effect.
>
> At this point, EPA voiced their opinion on indirect effects from their action. They believe there are no indirect effects associated with the delegation [*sic*] because it is simply an administrative action. We disagree with their interpretation and told them that we have to evaluate all the effects (direct, indirect, interrelated and interdependent) *regardless of whether they could do anything about those effects*.

Id. at 121 (emphasis supplied).

At this point, the agencies decided to elevate their dispute to their respective Washington headquarters for resolution. *Id.* at 123. In the October 4, 2002 interagency elevation document, FWS's position was summarized as follows:

> FWS is concerned that, following EPA Region 9's approval action, endangered species, in particular, the cactus ferruginous pygmy-owl, the Pima pineapple cactus, and perhaps other species, will be adversely impacted in the future by projects that will require State NPDES permits issued by the State of Arizona. The FWS's concerns involve the indirect effects of permit issuance from *non-water-quality-related impacts* from these projects, such as construction, water usage, and similar activities that affect individuals of the species either directly or through disturbance of their habitat. *The concerns do not involve water quality issues related to the discharges that will be regulated under the State NPDES permits.*
>
> . . . FWS maintains that EPA needs to ensure that a consultation process, or alternative process similar to that which exists, remains in place following the approval of the State program to address effects to listed species.

Pet. App. 562-63 (emphasis supplied). EPA, in contrast, continued to stress its limited authority and the administrative nature of approving Arizona's NPDES program:

> EPA Region 9 believes that it does not have legal authority to regulate the non-water-quality-related impacts associated with State NPDES-permitted projects that are of concern to FWS. . . .

> EPA Region 9 also believes that its approval action, which is an administrative transfer of authority, is not the cause of future non-discharge-related impacts on endangered species from projects requiring State NPDES permits.

Id. at 564.

The agencies' headquarters resolved the dispute. On December 3, 2002, FWS issued its biological opinion, concluding that EPA's approval of Arizona's NPDES program is not likely to jeopardize listed species or adversely modify designated critical habitat. *Id.* at 77-124. FWS acknowledged EPA's jurisdiction under the CWA, stating that the scope of the consultation was limited to listed species and critical habitat "in, adjacent to, or dependent on surface waters in Arizona." *Id.* at 77; see also *id.* at 108. FWS explained that the proposed action constituted an administrative shift in authority and would not cause increases in requests for CWA permits or real estate development. *Id.* at 113-14. FWS also accepted EPA's description of its regulatory authority under the CWA, including EPA's inability to object to NPDES permits "based on grounds other than guidelines and requirements of the CWA." *Id.* at 114; see also 33 U.S.C. § 1342(d)(2). Finally, FWS concluded that the environmental impacts of future real estate development in Arizona are speculative, and cannot be considered reasonably certain to occur. Pet. App. 114-15; see also 50 C.F.R. § 402.02 (definition of "effects of the action").

On December 5, 2002, EPA approved Arizona's program. J.A. 190-91; Pet. App. 69-76. Approval occurred nearly two months after the deadline for acting on State program submissions had passed. Since EPA's approval decision, ADEQ has been administering and enforcing the NPDES program (known as the AZPDES program) in all portions of Arizona other than Native American land.

As both the interagency elevation document and biological opinion indicate, the two principal species of concern during the consultation were the cactus ferruginous pygmy-owl and the Pima pineapple cactus. See, *e.g.*, Pet. App. 115, 562. The pygmy-owl is an upland species, and its habitat is not dependent on surface water quality. See *National Ass'n of Home Builders v. Norton*, 340 F.3d 835, 838 (9th Cir. 2003). FWS has removed the Arizona pygmy-owl population from the list of endangered and threatened species because the population does not qualify as a "distinct population segment" and is therefore not eligible for listing. *Final Rule to Remove the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-owl From the Federal List of Endangered and Threatened Wildlife*, 71 Fed.Reg. 19,452 (April 14, 2006); see also *Defenders of Wildlife v. Flowers*, 414 F.3d at 1070-71 & n.1; *National Ass'n of Home Builders*, 340 F.3d at 852. The Pima pineapple cactus is a species of desert cactus found in southern Arizona and northern Sonora, and is not associated with wetlands or watercourses.[12] The listing status of this cactus is currently being reviewed to determine whether it is a valid taxonomic entity. See *Notice of Status Review*, 70 Fed.Reg. 5,460, 5,461-62 (Feb. 2, 2005).[13]

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[12] See FWS background documents available at http://www.fws.gov/southwest/es/arizona/pima.htm (visited Feb. 6, 2007).

[13] Several other listed species are mentioned in the administrative record, including fish and other aquatic species. For example, the Huachuca water umbel, a wetland plant species, was discussed in the FWS field employees internal briefing statement. See J.A. 49. However, FWS's concerns related to water use in the Sierra Vista area rather than discharges of pollutants impairing the species' habitat. *Ibid.*; see also J.A. 121. The record makes clear that EPA and FWS agreed that approval of Arizona's program would have no adverse, water quality-related impacts on those species. See, *e.g.*, Pet. App. 562-63.

6. The Court Proceedings Below

On April 2, 2003, Defenders filed a petition with the court of appeals seeking review of EPA's approval of Arizona's program. See 33 U.S.C. § 1369(b)(1)(D) (providing for review in the circuit courts of EPA's determinations regarding State permitting programs); J.A. 257-69. Defenders never contended that Arizona's application or the AZPDES program failed to meet the nine criteria set forth in CWA Section 402(b). Instead, Defenders alleged that EPA violated Section 7(a)(2) of the ESA in approving Arizona's program. J.A. 258-61; Pet. App. 13. Home Builders, which consist of industry and trade associations representing the interests of Arizona businesses required to obtain NPDES permits, were granted permission to intervene as respondents. Pet. App. 13; see also J.A. 270-311.

Defenders also filed an amended complaint in a pending action in district court challenging FWS's biological opinion under the Administrative Procedure Act. Pet. App. 13. The district court determined that it lacked jurisdiction to decide Defenders' challenge to the FWS's biological opinion, and ordered that the claim be severed and transferred to the Ninth Circuit. *Ibid*; see also J.A. 312-20. The court of appeals consolidated the cases and issued its opinion on August 22, 2005.

A majority of the court of appeals' panel held that FWS's biological opinion was "fatally deficient" and that EPA "fail[ed] to understand its own authority under section 7(a)(2) to act on behalf of listed species and their habitat." Pet. App. 47-48, 60. The court acknowledged that CWA Section 402(b) foreclosed EPA's discretion to act for the benefit of listed species. *Id.* at 53. The court held instead that ESA Section 7(a)(2) grants *independent authority* to federal agencies to act for the benefit of listed

species, that such authority overrides any constraints imposed by Congress in the CWA, and that any "authorizing action" creates an obligation to exercise this authority. *Id.* at 38-39, 53.

To support this holding, the court focused on the phrase "insure that any action . . . is not likely to jeopardize" in Section 7(a)(2), concluding Congress intended this phrase to grant Federal agencies authority to act affirmatively to benefit listed species, rather than prohibiting actions that jeopardize species. *Id.* at 30-38. The majority also determined that whenever a Federal agency authorizes, funds or carries out an action, Section 7(a)(2) applies: "the EPA had exclusive decisionmaking authority over Arizona's pollution permitting transfer application. The EPA's decision authorized the transfer, thus triggering section 7(a)(2)'s consultation *and action* requirements." *Id.* at 43-44 (emphasis supplied).

The court concluded that EPA needed to address "whatever harm may flow from the loss of section 7 consultation" (*id.* at 47), notwithstanding EPA's non-discretionary obligation to approve Arizona's NPDES program under CWA Section 402(b). In the court's view, EPA could not approve Arizona's program, even if that program satisfied CWA Section 402(b), unless EPA found "sufficient substitutes for section 7's consultation and mitigation mandates." *Id.* at 52. As the remedy, the court vacated EPA's approval of Arizona's program, relying primarily on future adverse impacts on the cactus ferruginous pygmy-owl. *Id.* at 61-63.

Senior Circuit Judge Thompson dissented, stating that "EPA did not have discretion to deny transfer of the pollution permitting program to the State of Arizona; therefore its decision was not 'agency action' within the meaning of Section 7 of the [ESA]." *Id.* at 66. Judge

Thompson explained that prior Ninth Circuit opinions recognized, in accordance with 50 C.F.R. § 402.03, that Section 7(a)(2) applies only to actions in which an agency has discretion to act for the benefit of listed species. *Id.* at 64-66 (citing numerous opinions). The dissent also pointed out that the majority's interpretation was in direct conflict with other circuits' interpretation of CWA 402(b), which have held that EPA's obligation in reviewing a State's program submittal under CWA Section 402(b) is limited to evaluating the statute's nine criteria. *Id.* at 66-67.

Home Builders, EPA and FWS, and the State of Arizona filed petitions seeking rehearing *en banc* based on the intra-circuit and inter-circuit conflicts created by the majority's opinion. On June 8, 2006, the court of appeals issued its order denying both panel and *en banc* rehearing. *Id.* at 134-58. Six circuit judges dissented from the denial of rehearing on multiple grounds. *Id.* at 135-49. Circuit Judge Kozinski stated, for example, "the majority tramples all over the [FWS's] reasonable interpretation of the ESA, deliberately creates a square inter-circuit conflict with the Fifth and D.C. Circuits, and ignores at least six prior opinions of our own court." *Id.* at 135-36.

SUMMARY OF ARGUMENT

No dispute exists that: (1) Arizona's NPDES program submission satisfied the nine requirements specified by Congress in Section 402(b) of the CWA as well as EPA's implementing regulations; and (2) the plain language of Section 402(b) forecloses EPA's discretion to act for the benefit of listed species in approving a State's program. Nonetheless, the court of appeals held that the ESA overrides the Congressional mandates set forth in the CWA. That holding is erroneous for several reasons:

(1) The court of appeals ignored the plain language of CWA Section 402(b), which states that EPA "*shall approve*" a State's NPDES program "*unless*" one or more of nine specified criteria are not met. Congress' "shall/unless" phrasing was deliberate and precludes the consideration of other criteria, including impacts to listed species. The court treated ESA Section 7(a)(2) – a statute of general applicability – as implicitly repealing Congress' mandatory direction in the CWA, upsetting the Federal-State balance struck by the CWA.

(2) The court of appeals improperly disregarded the Services' regulation, 50 C.F.R. § 402.03, limiting the applicability of Section 7(a)(2) to actions in which there is *discretionary* Federal involvement or control. The Services' regulation was adopted in 1986 following notice-and-comment rulemaking, and has been in effect for over 20 years. Section 7(a)(2) is ambiguous, as shown by the conflict between the Ninth Circuit and other circuits, and the Services' interpretation is reasonable, as shown by those circuits' decisions interpreting Section 7(a)(2)'s application. Nevertheless, the court gave no deference to 50 C.F.R. § 402.03, and improperly substituted its view of how Section 7(a)(2) should apply.

(3) Rather than following the plain language of CWA 402(b) or deferring to the Services' long-standing interpretation of Section 7(a)(2), the court of appeals erroneously interpreted Section 7(a)(2) as granting authority to Federal agencies that must be exercised whenever an agency authorizes, funds or carries out an activity. To support this holding, the court incorrectly applied *TVA v. Hill*, 437 U.S. 153 (1978), ignoring that case's factual context and the narrow questions presented to this Court. *TVA v. Hill* involved a discretionary public works project carried out by a Federal instrumentality, and there was no dispute that completion of the project would eradicate a listed species and destroy its designated

critical habitat. The court also incorrectly construed the ESA's legislative history, ignoring Congress' stated policy in ESA Section 2(c)(1) that agencies are to "use their authorities in furtherance of" the Act.

(4) In determining the effects of EPA's action, the court of appeals facially adopted but failed to follow *Department of Transp. v. Public Citizen*, 541 U.S. 752 (2004), which held that a Federal agency cannot be considered the legally relevant cause of an environmental effect that it lacks authority to control. The court concluded that EPA's approval of Arizona's NPDES program was the "but for" cause of impacts to listed species resulting from future private land use activities. That conclusion was based on the court's erroneous belief that EPA, when issuing an NPDES permit, has authority to regulate how private land is used, which conflicts with the CWA's basic framework and EPA's jurisdiction under CWA Section 402, which gives EPA authority to regulate and control discharges of pollutants – not real estate development.

(5) The record shows that EPA consistently maintained that its authority under the CWA is limited and that EPA complied with that Act in approving Arizona's NPDES program. Because the questions before the Court involve the interpretation of Federal statutes and their implementing regulations, remand to the EPA would add nothing to the record, particularly given that EPA and the Services now have adopted a formal policy governing approval of State NPDES programs.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 402(b) OF THE CLEAN WATER ACT PRECLUDES THE APPLICATION OF THE ENDANGERED SPECIES ACT TO EPA'S APPROVAL OF STATE NPDES PROGRAMS.

A. The Criteria Specified by Congress in Section 402(b) of the Clean Water Act Are Exclusive and EPA Must Approve State NPDES Programs Meeting Those Criteria.

The plain language of CWA Section 402(b) requires EPA to approve State NPDES programs if nine specific criteria are met. None of those criteria mentions protection of listed species or the ESA. As Judge Kleinfeld explained, in dissenting from denial of rehearing, this case should have been simple: "[Section 402(b)] is mandatory. Congress commands that the agency 'shall approve' state programs 'unless' one or more of nine conditions are not met. The 'shall/unless' formula makes the nine condition list exclusive, and courts cannot add conditions to the list." Pet. App. 149. The mandatory nature of Section 402(b) is supported by Congress' express policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and, moreover, "that the States manage" the NPDES program. 33 U.S.C. § 1251(b).

In addition, the legislative history shows that Congress deliberately chose the mandatory "shall/unless" phrasing found in Section 402(b)(2). The bills originally enacted by each house contained different language, with the Senate's bill allowing, but not requiring, EPA to approve State programs. Compare H.R. Conf. Rep. No. 92-1465, at 138 (1972) ("[u]nder section 402, the Administrator *can* delegate permit authority to a State if the State program is adequate"; describing Senate Bill

2770 (1972) (emphasis supplied)) with *id.* at 139 ("the Administrator is *required to approve* a submitted State program *unless* he finds that there is not adequate authority . . . "; describing House Bill 11896 (1972) (emphasis supplied)). The Conference Committee substituted the House of Representatives' amendment, resulting in Section 402(b)'s mandatory direction. *Id.* at 139; see also *EPA v. California,* 426 U.S. at 208.

This Court interpreted similar statutory language in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), holding that "shall" means "shall." There, the Court considered EPA's obligation to approve state implementation plans under Section 110(a)(2) of the Clean Air Act, 42 U.S.C. § 7410(a)(2):

> The provision sets out eight statutory criteria that [a State's] implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. *The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified*, . . . and none of the eight factors appears to permit consideration of technological or economic infeasibility.

Union Electric, 427 U.S. at 257 (citation omitted; emphasis supplied).

In *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297-99 (5th Cir. 1998) (*AFPA*), the Fifth Circuit squarely addressed the mandatory nature of CWA Section 402(b) in connection with a challenge to EPA's approval of Louisiana's NPDES permitting program. As a condition of approval, EPA required Louisiana to submit proposed permits to the Services, which EPA would veto if either FWS or NMFS determined that the permit would adversely impact listed species. *AFPA*, 137 F.3d at 293-94. The Fifth Circuit held EPA lacked authority under

the CWA to impose conditions to benefit listed species, explaining:

> [Section 402(b)'s] plain language directs EPA to approve proposed state programs that meet the enumerated criteria; particularly in light of the command "shall approve," § 304(i) cannot be construed to allow EPA to expand the list of permitting requirements. Applying *Chevron*, we conclude that Congress *has* spoken directly to the precise question at issue: EPA's discretion lies not in modifying the list of enumerated criteria, but simply in ensuring that those criteria are met.

Id. at 298 (following *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)) (emphasis in original); see also *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 173-74 (D.C. Cir. 1988) (*NRDC II*) (Section 402(b) "commands" EPA to "approve the state permit system" once the statutory requirements are met); *Citizens for a Better Env't v. EPA*, 596 F.2d 720, 722 (7th Cir. 1979) ("If the state program satisfies the statutory requirements of section 402(b) . . . [EPA] must approve the program."); *Save the Bay*, 556 F.2d at 1285 ("Unless the Administrator of EPA determines that the proposed state program does not meet these requirements, he must approve the proposal.").

In this case, the court of appeals recognized that "the Clean Water Act does not grant the EPA authority to make pollution permitting transfer decisions for the benefit of all endangered species." Pet. App. 53. As a matter of statutory construction, that conclusion should have been controlling. *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

B. The Court of Appeals' Holding Violates the Canons of Statutory Construction and Results in the Implied Repeal of Section 402(b) of the Clean Water Act.

Instead of following the plain language of CWA Section 402(b), the court of appeals concluded that EPA must address "whatever harm may flow from the loss of section 7 consultation" (Pet. App. 47), and cannot approve Arizona's program without "sufficient substitutes for section 7's consultation and mitigation mandates" (*id.* at 52). The court therefore added a tenth criterion to CWA Section 402(b), effectively holding that States must adopt and enforce their own version of the ESA to obtain authority to administer the NPDES program. In so holding, the court violated two cardinal rules of statutory construction: (1) specific statutes are not controlled by general statutes; and (2) repeals by implication are strongly disfavored.

"It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); see also *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

In the CWA, "Congress struck a careful balance among competing policies and interests," and "protected certain sovereign interests of the States." *Arkansas v. Oklahoma*, 503 U.S. 91, 106-07 (1992). Congress did so, in part, through Section 402, which not only created the NPDES program, but requires EPA to approve State NPDES programs satisfying detailed criteria, imposes a strict deadline for State program approval, and establishes

specific post-approval oversight requirements. 33 U.S.C. § 1342(b)-(f). By contrast, the ESA addresses the general objective of protecting listed species and habitat critical to their survival. There is no evidence that Congress intended to upset the Federal-State balance struck in the CWA or modify the detailed program criteria, the deadline for EPA decisions and other specific requirements imposed under CWA Section 402 when it enacted the ESA. See *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788-91 (1976) (reversing the court of appeals' determination that the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, applies to approval of registration statements under the Interstate Land Sales Disclosure Act).

Moreover, "repeals by implication are not favored." *Morton*, 417 U.S. at 549-550 (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)); see also Norman J. Singer, 1A *Sutherland Statutory Construction* § 22:13 (6th ed. 2007) (principles of implied repeal apply to implied amendment). "The intention of the legislature to repeal must be 'clear and manifest.'" *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton*, 417 U.S. at 550; see also *United States v. Fausto*, 484 U.S. 439, 452-53 (1988). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton*, 417 U.S. at 551.

There is no affirmative showing of Congressional intent to override the plain and specific language of CWA

Section 402(b). Thus, the only possible basis for an implied repeal is that the statutes are irreconcilable. Any conceivable conflict, however, was eliminated by the Services' 1986 rulemaking, discussed below, interpreting the phrase "actions authorized, funded, or carried out" by Federal agencies as being limited "to all actions in which there is discretionary federal involvement or control." 50 C.F.R. § 402.03. Therefore, the plain language of CWA Section 402(b) is controlling.

II. THE COURT OF APPEALS FAILED TO DEFER TO THE SERVICES' LONG-STANDING INTERPRETATION OF SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT.

More than 20 years ago, the Services promulgated regulations interpreting and implementing ESA Section 7, including 50 C.F.R. § 402.03, governing the applicability of Section 7(a)(2) to Federal agency actions. The court of appeals disregarded that regulation, variously describing 50 C.F.R. § 402.03 as a "gloss" on, and as being "congruent" and "coterminous with" the statutory phrase "authorized, funded, or carried out." The court instead substituted its own view of how the statute should be read. Pet. App. 39-42. This violated settled law:

> [A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. . . . If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.

National Cable & Telecomm. Ass'n v. Brand X Internet Services, 545 U.S. 967, 980 (2005) (following *Chevron*, 467 U.S. at 843-44 & n.11, 865-66). This Court previously recognized that "[w]hen it enacted the ESA, Congress delegated broad administrative and interpretative power to the Secretary." *Babbitt v. Sweet Home Ch. of Communities for a Great Ore.*, 515 U.S. 687, 708 (1995) (upholding FWS's regulation defining "harm"). The court of appeals ignored *Chevron* and *Sweet Home,* and erroneously afforded no deference to the agencies' interpretation of Section 7(a)(2).

The Services' current rules have their genesis in the original version of Section 7, which consisted of a two-sentence paragraph and contained a number of undefined terms and no description of the consultation process. Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892. The following year, the Services began providing guidance to other Federal agencies and, in early 1976, issued guidelines governing Section 7. See *Interagency Cooperation Regulations; Final Rule*, 43 Fed.Reg. 870 (Jan. 4, 1978). The Services' guidelines were revised and, after notice-and-comment rulemaking, were issued as formal regulations in 1978 and codified in 50 C.F.R. pt. 402. *Id.* at 873-76.

The ESA was subsequently amended by Congress, and Section 7 was divided into subsections and expanded.[14] Nevertheless, certain key terms (including, for example, "jeopardize" and "destruction or adverse modification")

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[14] See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751; Endangered Species Act Amendments of 1979, Pub. L. No. 96-159, 93 Stat. 1225; Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411. The legislative history shows that Congress was aware that the Services had promulgated regulations implementing Section 7 and creating the consultation process. See H.R. Rep. 95-1625, at 12 (1978) (Pet. App. 491-92); H.R. Conf. Rep. No. 95-1804, at 18 (1978) (Pet. App. 486-87).

were left undefined, and aspects of the consultation process remained unclear. Consequently, in 1986, the Services promulgated new regulations governing Section 7 implementing the amendments. *Interagency Cooperation Regulations; Final Rule*, 51 Fed.Reg. 19,926 (June 3, 1986) (codified at 50 C.F.R. pt. 402) (Pet. App. 318-480). The Services' regulations fill in definitional and interpretive gaps in the statute and provide a uniform process for Section 7 consultation.

In their 1986 rulemaking, which began in 1983 and involved public notice and comment, the Services expressly recognized that an agency's obligations under Section 7(a)(2) are limited by its existing legal authority. See, *e.g.*, *id.* at 19,937 ("a Federal agency's responsibility under section 7(a)(2) permeates the full range of discretionary authority held by that agency") (Pet. App. 365). In addition to 50 C.F.R. § 402.03, other regulations recognize that a federal agency's duties under Section 7(a)(2) are limited by its existing authorities. 50 C.F.R. § 402.16 requires the re-initiation of consultation "where discretionary Federal involvement or control over the action has been retained." Similarly, 50 C.F.R. §§ 402.02 and 402.14(g)(8) require that reasonable and prudent alternatives suggested by the Services to avoid jeopardy be "consistent with the scope of the Federal agency's legal authority and jurisdiction."[15]

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[15] In the preamble, the Services, discussing the regulatory definition of "reasonable and prudent alternatives," acknowledged that they "should be mindful of the limits of a Federal agency's jurisdiction and authority when prescribing a reasonable and prudent alternative. An alternative, to be reasonable and prudent, should be formulated in such a way that it can be implemented by a Federal agency consistent with the scope of its legal authority and jurisdiction." *Interagency Cooperation Regulations*, 51 Fed.Reg. at 19,937 (Pet. App. 365). Under the court of appeals' interpretation of ESA Section 7(a)(2), however, an alternative is always within the agency's legal

(Continued on following page)

The Services' interpretation of the applicability of Section 7(a)(2) is consistent with judicial interpretations of the statute. Prior to the completion of the Services' 1986 rulemaking, the Tenth Circuit stated:

> The [ESA] does not, by its terms, enlarge the jurisdiction of the Corps of Engineers under the [CWA]. . . . The question in this case is how broadly the Corps is authorized to look under the [CWA] in determining the environmental impact of the discharge [of pollutants] that it is authorizing.

Riverside Irr. Dist. v. Andrews, 758 F.2d 508, 512 (10th Cir. 1985); see also *In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 630 (8th Cir. 2005) ("the ESA does not apply where an agency has no statutory authority to act with discretion"); *AFPA*, 137 F.3d at 299 (Section 7(a)(2) directs "agencies to channel their *existing* authority in a particular manner" (emphasis in original)); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (Section 7 "directs agencies to 'utilize their authorities' to carry out the ESA's objectives" and does not allow agencies to exceed their statutory authority).

The court of appeals, in contrast, interpreted Section 7(a)(2) as applying whenever an agency exercises any "decisionmaking authority," regardless of the constraints on that authority. Pet. App. 42-44. The court further determined that an inter-circuit conflict already existed regarding the applicability of Section 7(a)(2) to non-discretionary actions. *Id.* at 44-47. Conflicting judicial interpretations of statutory terms demonstrate the existence of ambiguity. See *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996).

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authority and jurisdiction because Section 7(a)(2) independently grants authority to agencies.

The Services' regulatory interpretation of the applicability of Section 7(a)(2) to Federal actions appropriately harmonizes the obligations imposed by Section 7(a)(2) with EPA's obligations under CWA Section 402, and prevents the imposition of conflicting statutory duties. Consequently, 50 C.F.R. § 402.03 is entitled to deference under *Chevron*. See, *e.g.*, *Brand X*, 545 U.S. at 980; *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (A reviewing court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable"). "When Congress has entrusted the Secretary [of the Interior] with broad discretion, we are especially reluctant to substitute our views of wise policy for his." *Sweet Home*, 515 U.S. at 708. The court of appeals erred by dismissing 50 C.F.R. § 402.03 because it "is a regulation, *not* a statute." Pet. App. 43 n.19 (emphasis in original).[16]

[16] The court of appeals also suggested that 50 C.F.R. § 402.03 was not relevant to its analysis because EPA: (1) elected to initiate consultation with FWS; and (2) refused to take a position below on whether it was required to consult. Pet. App. 43 n.19. But EPA never formally determined that its action was subject to Section 7(a)(2), *i.e.*, that EPA could disapprove Arizona's NPDES program despite finding that the program satisfied the CWA's criteria. Moreover, EPA's reluctance to take a position did not prevent the State of Arizona and Home Builders from arguing, as they did, that the applicability of Section 7(a)(2) is governed by 50 C.F.R. § 402.03. As the dissenting judges recognized, this is a legal issue involving the interpretation of statutes and agency regulations. See Pet. App. 64-67 & n.1; *id.* at 142 ns.1 & 2.

III. SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT DOES NOT GRANT FEDERAL AGENCIES INDEPENDENT AUTHORITY TO ACT FOR THE BENEFIT OF LISTED SPECIES.

Rather than following the plain language of CWA Section 402(b), the court of appeals reinterpreted Section 7, holding that Section 7 grants additional power to Federal agencies to act for the benefit of listed species, and creates an affirmative obligation to exercise that power whenever a Federal agency authorizes, funds or carries out an activity. See, *e.g.*, Pet. App. 30-44. The court of appeals thus held that Section 7 augments EPA's authority, allowing EPA, in issuing an NPDES permit, to control how private land is used and how State water rights are exercised. Yet Congress limited EPA's authority to regulating discharges of pollutants into the navigable waters and, further, expressly recognized and preserved the rights of each State to "plan the development and use . . . of land and water resources" and to "allocate quantities of water within its jurisdiction" (33 U.S.C. § 1251(b) & (g)). No court has previously interpreted Section 7(a)(2) in this manner. As shown below, the court of appeals' expansive reading of ESA Section 7 is not supported by *TVA v. Hill* or by the Act's the legislative history.

A. The Language of the Endangered Species Act of 1973 Does Not Support the Court of Appeals' Interpretation of Section 7(a)(2).

Section 7, as enacted in 1973, consisted of a single paragraph and provided:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the

> Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of [listed species] and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such [listed species] or result in the destruction or modification of [critical] habitat.

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 892. Thus, as originally enacted, Section 7 imposed two obligations on federal agencies: (1) to carry out programs for the conservation of listed species; and (2) to ensure that actions they authorize, fund, or carry out do not jeopardize the continued existence of listed species or destroy critical habitat. Both obligations were qualified by the phrase "utilize their authorities." *Ibid.* This version of Section 7 was applied by the Court in *TVA v. Hill*.

This statute (as well as the 1973 Act generally) significantly increased Federal protection for wildlife. The Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (repealed 1973), for example, contained language similar to Section 7, but the obligations of Federal agencies were vague and heavily qualified. The Secretary of the Interior was required to review and utilize other programs administered by him in furtherance of the Act "to the extent practicable." *Id.* at § 2(d), 80 Stat. 927. The Secretary was also required to "encourage" other Federal agencies to "utilize, where practicable, their authorities in furtherance of the purposes of this Act" and to "consult with and assist such agencies in carrying out [the] endangered species program." *Ibid.* Federal agencies were required to "seek to" protect wildlife species and to preserve the habitat of such species "on lands under their jurisdiction," but only "insofar as is practicable and consistent with [their] primary purposes." *Id.* at § 1(b), 80 Stat. 926; see also *TVA v. Hill*, 437 U.S. at 174-76 (discussing prior legislation).

As this Court indicated in *TVA v. Hill*, 437 U.S. at 174, the 1973 Act and its legislative history must be read against this backdrop. Thus, for example, Representative Dingell explained, "[Section 7] substantially amplifie[s] the obligation of [federal agencies] to take steps *within their power* to carry out the purposes of this act." 437 U.S. at 183 (emphasis supplied). There is nothing in the 1973 legislative history indicating that Congress intended, in enacting Section 7, to grant additional authority to Federal agencies or to override non-discretionary mandates in other statutes. And, as explained below, *TVA v. Hill* does not support a contrary interpretation.

B. *TVA v. Hill* Does Not Support the Court of Appeals' Interpretation of Section 7(a)(2).

The panel majority's principal authority for its interpretation of Section 7(a)(2) was *TVA v. Hill*. Pet. App. 32-38. In that case, the Court did not consider whether Section 7 grants additional authority to agencies. Instead, the Court addressed two questions: (1) whether the ESA requires a court to enjoin the operation of a virtually completed Federal dam – a *discretionary* public works project – where the Interior Secretary had "determined that operation of the dam would eradicate an endangered species"; and (2) whether continued appropriations for the project constituted an implied repeal of the ESA. *TVA v. Hill*, 437 U.S. at 156. No dispute existed that the dam's operation would not only violate the ESA, but would directly cause the extirpation of a listed species. *Id.* at 171 ("We begin with the premise that operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat."). Consequently, the Court held, based on those facts, that Congress had foreclosed the

exercise of equitable discretion and affirmed the court of appeals' injunction preventing operation of the dam. *Id.* at 193-96.

On the second question, the Court held that a line item in an appropriations act failed to evidence a clear and manifest intent by Congress to override the ESA, relying on the rule that repeals by implication are disfavored. *Id.* at 189-93. The Court explained that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress," and that "there is no indication that Congress as a whole was aware of TVA's position." *Id.* at 191-92. The Court also explained that until 1978, the Appropriations Committee was unaware of the possible applicability of Section 7 to the project, and that funds had been appropriated to allow the snail darter to be transplanted, potentially avoiding any conflict. *Id.* at 192-93. The Court's analysis did not address the obligation of a Federal agency faced with a non-discretionary statutory mandate.

In short, the Court did not hold that ESA Section 7 granted additional powers to federal agencies, nor did the Court need to do so given the questions presented and the indisputable violation of the statute's prohibition against jeopardizing listed species. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-17 (1982) (discussing and distinguishing *TVA v. Hill* in the context of an alleged CWA violation). The excerpts of legislative history discussed by the Court, while showing that Congress intended to strengthen the protections afforded listed species relative to the ESA's predecessor statutes, do not demonstrate that Congress intended to grant agencies independent authority to act for the benefit of listed species.

C. The 1978 and 1979 Amendments to the Endangered Species Act Did Not Expand the Scope and Applicability of Section 7(a)(2).

The court of appeals also relied on the 1978 and 1979 ESA amendments, which divided Section 7 into subsections and added the Endangered Species Committee exemption process, as evidencing Congress' intent to grant additional power to agencies. Pet. App. 34-38. Again, the court simply read too much into these amendments, which did not alter the obligations of Federal agencies.

The court cited the different language found in ESA Sections 7(a)(2) and 7(a)(1) as supporting its statutory interpretation. *Id.* at 34. Section 7(a)(1), 16 U.S.C. § 1536(a)(1), directs agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of species." Since Section 7(a)(1) refers to agencies' "authorities" while Section 7(a)(2) does not, the court concluded Congress intended to grant additional authority to federal agencies in Section 7(a)(2). *Id.* at 34-35. This conclusion was erroneous for several reasons.

Section 2(c) of the original statute (which survives in the current Act) declares Congress' policy that all federal agencies "shall seek to conserve . . . species and *shall use their authorities* in furtherance of this chapter." Endangered Species Act of 1973, Pub. L. No. 93-205, § 2(c), 87 Stat. 885 (currently at 16 U.S.C. § 1531(c)(1)) (emphasis supplied). As shown above, Section 7, as originally enacted, contained the same qualifying language. *Id.* at § 7, 87 Stat. 892. The court of appeals cited a 1973 committee report to show that Section 7 contained two distinct obligations, which later became separate subsections. Pet. App. 34-35. But that report simply paraphrased without explanation the language in

the original version of Section 7. See H.R. Rep. No. 93-412, at 14 (1973). The same report also explained, in discussing the purpose of the ESA, that "the bill declares a policy that Federal agencies are to *use the authorities that are available to them* in carrying out the objectives of this bill." *Id.* at 6 (emphasis supplied); see also *id.* at 10 (discussing ESA Section 2(c)).

Moreover, Congress explained that its amendments to Section 7 merely restated "existing law":

> The conferees adopted Senate language creating a new Section 7(a), *which essentially restates section 7 of existing law*, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . The Conferees felt that the Senate provision *by retaining existing law*, was preferable since regulations governing section 7 are now familiar to most Federal agencies . . . .

H.R. Conf. Rep. No. 95-1804, at 18 (emphasis supplied) (Pet. App. 487); see also Pet. App. 36 ("The 1978 amendment did not change section 7's substantive provisions."). Under "existing law," an agency's obligation under Section 7 is limited by its authorities.

The court of appeals also failed to consider that Sections 7(a)(1) and 7(a)(2) have different language because those provisions impose different requirements, neither of which grants Federal agencies additional legal authority. Section 7(a)(1) *affirmatively directs* all Federal agencies to act for the benefit of listed species, but limits that obligation to actions within each agency's existing authority under its governing statutes. Section 7(a)(2), in contrast, *prohibits* agencies from jeopardizing listing species or destroying their critical habitat when "authorizi[ng], fund[ing] or carr[ying] out" an action, which necessarily means that agency is acting (or proposing to act) within the scope of its authority under its

governing statutes. In other words, the limitation in Section 7(a)(1) would be redundant in Section 7(a)(2) because an agency does not authorize, fund or carry out an activity without being authorized to do so in the first place. Nothing in Section 7(a)(2) suggests that Congress intended to authorize Federal agencies to ignore non-discretionary mandates imposed by other statutes.[17]

The court of appeals also claimed support for its interpretation of Section 7 from ESA Sections 7(g) and (h), 16 U.S.C. § 1536(g) & (h), which were enacted in the wake of *TVA v. Hill* and created a process under which projects can be exempted from Section 7(a)(2). Pet. App. 36-37. The exemption process, however, deals with irreconcilable conflicts presented *after the consultation has concluded*, when, as in *TVA v. Hill*, a discretionary Federal action would jeopardize a listed species. See, *e.g.*, H.R. Conf. Rep. No. 96-697, at 14 (1979) ("The exemption process was designed to resolve endangered species conflicts after other administrative remedies, including consultation have been exhausted. It makes no sense to initiate an exemption process before it has been determined that there is a need for an exemption in the first place.") (Pet. App. 514-15). The enactment of the exemption process is irrelevant to whether Section 7(a)(2) applies to EPA's approval of State NPDES programs and other non-discretionary actions.

In sum, there is simply nothing that supports the court of appeals' interpretation of Section 7(a)(2). While

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[17] In the 1978 amendments, Congress separated the second sentence of Section 7 into two sentences and eliminated the phrase "by taking action necessary" from the statute. Compare Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 892, with Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3752. This amendment also indicates that Section 7(a)(2) is intended to prohibit Federal agencies from jeopardizing listed species when acting pursuant to their existing authorities, rather than requiring agencies to take affirmative action to benefit species.

Congress strengthened the protection afforded species of fish and wildlife when it enacted the ESA in 1973, Congress did not enact a law that generally requires Federal agencies to violate their governing statutes whenever they authorize, fund or carry out an activity. This Court did not interpret Section 7 in this manner in *TVA v. Hill*, and the legislative history does not support such an illogical result.

IV. EPA'S APPROVAL OF ARIZONA'S NPDES PROGRAM WAS NOT THE LEGALLY RELEVANT CAUSE OF FUTURE IMPACTS TO LISTED SPECIES RESULTING FROM PRIVATE LAND USES.

In *Public Citizen*, this Court addressed the obligations of federal agencies under NEPA, an analogous environmental statute. NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It applies to Federal actions "to the fullest extent possible," 42 U.S.C. § 4332, and "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." *Baltimore Gas & Electric Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

The central issue in *Public Citizen* was the scope of analysis required under NEPA. The Court explained that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause," not simply an attenuated "but for" causal relationship. 541 U.S. at 767 (following *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). Thus, the Federal Motor Carrier Safety Administration (FMCSA), in adopting regulations imposing inspection and safety requirements on Mexican-domiciled motor carriers operating in the United States, was required to evaluate

only those environmental impacts resulting from activities that Congress authorized the agency to regulate. *Id.* at 768-69. The Court concluded:

> We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its [environmental assessment] when determining whether its action is a "major Federal action."

Id. at 770.

In this case, the court of appeals, noting the similarity between the regulations defining the effects of an agency's action under NEPA and the ESA, adopted the Court's *Public Citizen* standard for determining whether a proposed action is the legally relevant cause of adverse effects to listed species under Section 7(a)(2). Pet. App. 29-30. The court of appeals explained that a causal relationship must exist between the proposed action and impacts on listed species, and that such a relationship depends on the agency's legal authority. *Id.* at 29 ("a negative impact on listed species is the likely direct or indirect effect of an agency's action *only if the agency has some control over that result*" (emphasis supplied)). The court nevertheless held, purporting to apply *Public Citizen*, that EPA's approval of Arizona's NPDES program "will cause whatever harm may flow from the loss of section 7 conservation benefits" on future projects requiring an NPDES permit to discharge pollutants, and this "harm" is an "indirect effect" of EPA's action. See *id.* at 47-48.

"Indirect effects" are "caused by the proposed action, are later in time, but are still reasonably certain to occur." 50 C.F.R. § 402.02 (definition of "effects of the action"). Indirect effects "include the effects on listed species and

critical habitat of future activities that are induced by the action subject to consultation and that occur after the action is completed." *Interagency Cooperation Regulations*, 51 Fed.Reg. at 19,932 (Pet. App. 344). Real estate development is not induced by a change in the permit-issuing authority. As FWS explained in the biological opinion, "[d]evelopments are driven by any number of factors, including but not limited to demand, supply, economics, political decisions, zoning regulations, and financial market stability. Based upon the best available information, development in the action area will not be caused by EPA's proposed approval." Pet. App. 113.[18] The majority summarily rejected this reasoning as "implausible," concluding instead that future real estate development and CWA permits are links in the same "'but for' causal chain." *Id.* at 27-28. If this strained reasoning were applied to FMCSA's rulemaking in *Public Citizen*, the President's decision to lift the moratorium and the agency's promulgation of safety rules for Mexican motor carriers would likewise constitute "but for" links in the same causal chain. FMCSA thus would have been required to extend the scope of its NEPA analysis to impacts over which the agency had no control – a result this Court expressly rejected.[19]

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[18] FWS employees initially were confused about what type of causal relationship is needed for an impact to be considered an "indirect effect" under the Services' definition. See J.A. 328-30. As one FWS employee complained, "there is a basic lack of understanding throughout the Service as to what indirect effects are." *Id.* at 329.

[19] The court of appeals cited as authority for this point *Olympic Airways v. Husain*, 540 U.S. 644 (2004), which dealt with the interpretation of the term "accident" in the context of Article 14 of the Warsaw Convention. In *Public Citizen*, in contrast, this Court analogized NEPA's causation requirement to the tort concept of proximate cause. *Public Citizen*, 541 U.S. at 767 (following *Metropolitan Edison*, 460 U.S. at 774 & n.7).

The court of appeals' causation construct was based on its erroneous belief that EPA, when issuing CWA permits, has the authority to control how private land is used. In rejecting Home Builders' argument on this point, the court stated that NPDES permits "relate to the construction itself, not to a discrete discharge during construction." *Id.* at 49 n.22. No authority was cited for this statement, and it cannot be reconciled with the CWA's basic framework, which recognizes the paramount right of states to regulate land uses. 33 U.S.C. § 1251(b); see also *SWANCC*, 531 U.S. at 174. The NPDES program authorizes EPA (or a State with an approved program) to regulate discharges of pollutants from point sources, but does *not* authorize EPA to regulate the activity from which the discharge results. For example, in striking down EPA regulations authorizing the imposition of non-water quality related conditions in NPDES permits, the District of Columbia Circuit explained that "EPA's jurisdiction under the [CWA] is limited to regulating the discharge of pollutants. Thus, just as EPA lacks authority to ban construction of new sources pending permit issuance, so the agency is powerless to impose permit conditions unrelated to the discharge itself." *NRDC II*, 859 F.2d at 170. For the same reason, that court held in *NRDC I* that EPA lacks authority to impose a ban on the construction of a new facility that, when operating, will require an NPDES permit to discharge pollutants. 822 F.2d at 127-31. In short, "the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges – not potential discharges, and certainly not point sources themselves." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005) (emphasis in original); accord *United States v. Mango*, 199 F.3d 85, 93 & n.7 (2d Cir. 1999) (conditions imposed in permits issued under CWA Section 404, 33 U.S.C. § 1344, must be related to the discharge).

The court of appeals also justified its causation analysis by contending that home building and other private land uses are "activities that are interrelated or interdependent with [the Federal] action," *i.e.*, the issuance of NPDES permits. Pet. App. 50 (citing 50 C.F.R. § 402.02 (definition of "effects of the action")). The court, however, ignored the remainder of this definition, which provides: "Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration." 50 C.F.R. § 402.02. A real estate development, obviously, does not depend on a NPDES permit for its justification and has utility separate and apart from the permit – the purpose of the development is to build and sell homes, not discharge pollutants.

Consequently, when EPA consults with FWS under ESA Section 7(a)(2) in connection with issuing an NPDES permit, the consultation must be limited to effects on the water body receiving the discharge and the waters downstream thereof (*i.e.*, the "action area"). See 50 C.F.R. § 402.02 (defining "action area"); *Riverside Irr. Dist.*, 758 F.2d at 512 (the relevant "action area" relating to a CWA permit for the construction of a dam included downstream aquatic habitat). Real estate development and other private land uses are not an "effect" of the action because private land uses are not *caused* by the issuance of a NPDES permit. Thus, under *Public Citizen*'s causation analysis, EPA is not required by Section 7(a)(2) to ensure that future land uses do not jeopardize listed species or adversely modify their critical habitat. See 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.01, 402.03.

V. REMAND TO EPA WOULD NOT BE APPROPRIATE BECAUSE EPA COMPLIED WITH THE CLEAN WATER ACT AND THE ISSUES BEFORE THE COURT CONCERN THE INTERPRETATION OF STATUTORY PROVISIONS.

The court of appeals' determination that EPA took contradictory positions regarding its obligations under Section 7(a)(2) (see Pet. App. 23-28) was misplaced and, in any event, does not support a remand to EPA under the current posture of the case.

The court of appeals stated that EPA determined that it was required to consult with FWS but was "not permitted, as a matter of law, to take into account the impact on listed species" in acting on Arizona's NPDES program submission under CWA Section 402(b). Pet. App. 26-27. The court concluded that because both requirements cannot be correct, EPA's ultimate decision, *i.e.*, approval of Arizona's NPDES program, "was not the result of reasoned decisionmaking." *Id.* at 27.[20] This reasoning was superficial and conflicts with the record, which shows that EPA's position on its CWA authority was consistent, not arbitrary and capricious.

EPA consistently maintained that approval of Arizona's NPDES program under CWA Section 402(b) merely constituted a shift in administrative responsibility for issuing and enforcing permits under the NPDES program. See *id.* at 114, 564, 615. EPA also maintained it lacked authority

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[20] The court of appeals also concluded that EPA's (and FWS's) position, that future impacts on listed species resulting from private land use are not caused by the approval of Arizona's program, was implausible. Pet. App. 27-28. As discussed in part IV, *supra*, the court's conclusion was the result of erroneously applying *Public Citizen* and incorrectly assuming that EPA regulates upland land uses when issuing CWA permits, rather than discharges of pollutants into navigable waters.

under the CWA to regulate non-water-quality-related impacts resulting from private land use activities. See, *e.g.*, *id.* at 114, 564-65. EPA's position was consistent with the two prior consultations between EPA and the Services, which were also limited to species affected by surface water quality. *Approval of Application by Maine*, 66 Fed.Reg. at 12,793-94; *Approval of Application by Texas*, 63 Fed.Reg. at 51,201. Moreover, the local FWS employees agreed that approval of Arizona's NPDES program would have no adverse water quality-related impacts on listed species or critical habitat. See, *e.g.*, Pet. App. 563. At that point, the consultation should have concluded informally, without a biological opinion. See 50 C.F.R. §§ 402.13, 402.14(b)(1).

Instead, local FWS employees quarreled with EPA's interpretation of EPA's legal authority under the CWA, and contended "all the effects" of EPA's action must be evaluated "regardless of whether [EPA] could do anything about those effects," notwithstanding FWS's own confusion over what constitutes an "indirect effect." J.A. 121, 328-30. This dispute was elevated to the agencies' headquarters (*id.* at 123), and FWS issued a biological opinion containing the reasoning characterized as contradictory by the court. That reasoning, however, was premised on the plain language of CWA Section 402(b), which required EPA to approve Arizona's NPDES program if the nine statutory criteria are satisfied, and EPA's authority to regulate discharges of pollutants – not private land use activities.

The court of appeals acknowledged that EPA had "complied with its obligations under the [CWA]" (Pet. App. 47), and therefore its decision was neither arbitrary nor capricious. The court instead concluded that EPA mistakenly relied on FWS's biological opinion, which "was flawed in its basic legal premise." *Id.* at 48. The court of appeals' "legal premise" was that Section 7(a)(2) grants additional authority to Federal agencies and that this

authority overrides all non-discretionary mandates imposed by the CWA. Whether the court of appeals' interpretation of these statutes was correct is a legal question that this Court should decide. See 5 U.S.C. § 706 ("when presented, the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions"); see also Pet. App. 64-66 & n.1 (Thompson, J., dissenting); *id.* at 142 ns.1 & 2 (Kozinski, J., dissenting from denial of rehearing).

Remand to the agency is normally required "[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it . . . . " *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Thus, remand is appropriate when additional factual development or clarification is required. See, *e.g.*, *Gonzalez v. Thomas*, ___ U.S. ___, 126 S.Ct. 1613, 1615 (2006) (remanding the case to the agency because "[t]he matter required determining the facts and deciding whether the facts as found fall within a statutory term"); *INS v. Ventura*, 537 U.S. 12, 16-17 (2002) (same). Here, in contrast, the questions before the Court turn on the interpretation of the CWA and the ESA (and those statutes' implementing regulations), which does not require further development of a factual record.

As Home Builders and the State of Arizona argued below, EPA was not required to consult with FWS prior to approving Arizona's NPDES program: EPA has no discretion to act for the benefit of listed species when approving State programs under CWA Section 402(b), and the Services' regulation, 50 C.F.R. § 402.03, should have been controlling. To the extent that the positions of EPA and the Services on the applicability of Section 7(a)(2) to State NPDES program approvals under CWA Section

402(b) require clarification, the agencies now have authoritatively spoken on this issue and have determined Section 7(a)(2) does not apply in this context. See EPA Pet. App. 93a-102a (App. C), 103a-110a (App. D), 111a-116a (App. E). "[I]f the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by ambiguities of a statute with the implementing agency.'" *Brand X*, 545 U.S. at 981 (quoting *Smiley*, 517 U.S. at 742). Remand under these circumstances would add nothing to the record and, instead, would delay resolution of the significant legal questions presented in this case.

CONCLUSION

For the foregoing reasons, the decision by the United States Court of Appeals for the Ninth Circuit should be vacated.

DATED: February 20, 2007.

Respectfully submitted,

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STATUTES

33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter –

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or

abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

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33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

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33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements

of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

* * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be

subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and

guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS. – A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of –

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and

provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

* * *

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves

that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

* * *

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16 U.S.C. § 1531. Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that –

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve

to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to –

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as

may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

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16 U.S.C. § 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result

in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A) –

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth –

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section,

the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that –

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that –

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of

identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

REGULATIONS

40 C.F.R. § 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405(a) (National Pollutant Discharge Elimination System – NPDES) of the CWA. This part also specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 405(f) (sludge management programs) of the CWA. The requirements that a State sewage sludge management program must meet for approval by the Administrator under section 405(f) are set out at 40 CFR part 501.

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), 405, and 518(e) of the CWA, and implement the requirements of those sections.

(c) The Administrator will approve State programs which conform to the applicable requirements of this part. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405(a) will not be approved independent of a section 402 program.

(d)(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made

with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

(2) The procedures outlined in the preceding paragraph (d)(1) of this section for suspension of permitting authority and transfer of existing permits will also apply when EPA approves an Indian Tribe's application to operate a State program and a State was the authorized permitting authority under § 123.23(b) for activities within the scope of the newly approved program. The authorized State will retain jurisdiction over its existing permits as described in paragraph (d)(1) of this section absent a different arrangement stated in the Memorandum of Agreement executed between EPA and the Tribe.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the CWA and any comments received.

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by § 122.3, the

State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.

(2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

(h) In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.

NOTE: States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.

(i) Nothing in this part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

(2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

NOTE: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.

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40 C.F.R. § 123.21 Elements of a program submission.

(a) Any State that seeks to administer a program under this part shall submit to the Administrator at least three copies of a program submission. The submission shall contain the following:

(1) A letter from the Governor of the State (or in the case of an Indian Tribe in accordance with § 123.33(b), the Tribal authority exercising powers substantially similar to those of a State Governor) requesting program approval;

(2) A complete program description, as required by § 123.22, describing how the State intends to carry out its responsibilities under this part;

(3) An Attorney General's statement as required by § 123.23;

(4) A Memorandum of Agreement with the Regional Administrator as required by § 123.24;

(5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures;

(b)(1) Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If EPA finds that a State's submission is complete, the statutory review period (i.e., the period of time allotted for formal EPA review of a proposed State program under CWA) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.

(2) In the case of an Indian Tribe eligible under § 123.33(b), EPA shall take into consideration the contents of the Tribe's request submitted under § 123.32, in determining if the program submission required by § 123.21(a) is complete.

(c) If the State's submission is materially changed during the statutory review period, the statutory review period shall begin again upon receipt of the revised submission.

(d) The State and EPA may extend the statutory review period by agreement.

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40 C.F.R. § 123.61 Approval process.

(a) After determining that a State program submission is complete, EPA shall publish notice of the State's application in the FEDERAL REGISTER, and in enough of the largest newspapers in the State to attract statewide attention, and shall mail notice to persons known to be interested in such matters, including all persons on appropriate State and EPA mailing lists and all

permit holders and applicants within the State. The notice shall:

(1) Provide a comment period of not less than 45 days during which interested members of the public may express their views on the State program;

(2) Provide for a public hearing within the State to be held no less than 30 days after notice is published in the FEDERAL REGISTER;

(3) Indicate the cost of obtaining a copy of the State's submission;

(4) Indicate where and when the State's submission may be reviewed by the public;

(5) Indicate whom an interested member of the public should contact with any questions; and

(6) Briefly outline the fundamental aspects of the State's proposed program, and the process for EPA review and decision.

(b) Within 90 days of the receipt of a complete program submission under § 123.21 the Administrator shall approve or disapprove the program based on the requirements of this part and of CWA and taking into consideration all comments received. A responsiveness summary shall be prepared by the Regional Office which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received and explains the Agency's response to these comments.

(c) If the Administrator approves the State's program he or she shall notify the State and publish notice in the

FEDERAL REGISTER. The Regional Administrator shall suspend the issuance of permits by EPA as of the date of program approval.

(d) If the Administrator disapproves the State program he or she shall notify the State of the reasons for disapproval and of any revisions or modifications to the State program which are necessary to obtain approval.

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50 C.F.R. § 402.01 Scope.

(a) This part interprets and implements sections 7(a)-(d) [16 U.S.C. 1536(a)-(d)] of the Endangered Species Act of 1973, as amended ("Act"). Section 7(a) grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants ("listed species") and habitat of such species that has been designated as critical ("critical habitat"). Section 7(a)(1) of the Act directs Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or of Commerce, as appropriate, to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species. Such affirmative conservation programs must comply with applicable permit requirements (50 CFR parts 17, 220, 222, and 227) for listed species and should be coordinated with the appropriate Secretary. Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat. Section 7(a)(3) of the Act

authorizes a prospective permit or license applicant to request the issuing Federal agency to enter into early consultation with the Service on a proposed action to determine whether such action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(4) of the Act requires Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat. Section 7(b) of the Act requires the Secretary, after the conclusion of early or formal consultation, to issue a written statement setting forth the Secretary's opinion detailing how the agency action affects listed species or critical habitat Biological assessments are required under section 7(c) of the Act if listed species or critical habitat may be present in the area affected by any major construction activity as defined in § 404.02. Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. Section 7(e)-(o)(1) of the Act provide procedures for granting exemptions from the requirements of section 7(a)(2). Regulations governing the submission of exemption applications are found at 50 CFR part 451, and regulations governing the exemption process are found at 50 CFR parts 450, 452, and 453.

(b) The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share

responsibilities for administering the Act. The Lists of Endangered and Threatened Wildlife and Plants are found in 50 CFR 17.11 and 17.12 and the designated critical habitats are found in 50 CFR 17.95 and 17.96 and 50 CFR part 226. Endangered or threatened species under the jurisdiction of the NMFS are located in 50 CFR 222.23(a) and 227.4. If the subject species is cited in 50 CFR 222.23(a) or 227.4, the Federal agency shall contact the NMFS. For all other listed species the Federal Agency shall contact the FWS.

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50 C.F.R. § 402.02 Definitions.

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Director refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in

process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11-17.12.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which

is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Proposed critical habitat means habitat proposed in the FEDERAL REGISTER to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the FEDERAL REGISTER to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

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50 C.F.R. § 402.03 Applicability.

Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.

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50 C.F.R. § 402.14 Formal consultation.

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the

requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal

consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions.* The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that

to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraph (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot

alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may

proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

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50 C.F.R. § 402.16 Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

LEGISLATIVE HISTORY

Endangered Species Act of 1973, Pub. L. No. 93-205, Section 2, 87 Stat. 884, 885 (1973)

Sec. 2. (a) FINDINGS. – The Congress finds and declares that –

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to –

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements.

(5) encouraging the State and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish and wildlife.

(b) PURPOSES. – The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) POLICY. – It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

Endangered Species Act of 1973, Pub. L. No. 93-205, Section 7, 87 Stat. 884, 892 (1973)

INTERAGENCY COOPERATION

SEC. 7. The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.